# STATE PERSONNEL BOARD, STATE OF COLORADO Case No. 2005B006

#### INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

**WOLNEY CUNHA,** 

Complainant,

VS.

#### DEPARTMENT OF TRANSPORTATION,

Respondent.

Administrative Law Judge Hollyce Farrell held the hearing in this matter on August 31, 2005, and September 1, 2005, at the State Personnel Board, 633 17<sup>th</sup> Street, Courtroom 6, Denver, Colorado. The parties submitted written closing arguments and the record was closed on October 11, 2005. Complainant appeared and was represented by David Lichtenstein, Esq. Assistant Attorney General Vincent E. Morscher represented Respondent. Respondent's advisory witness was Robert Torres, the appointing authority.

#### MATTER APPEALED

Complainant, Wolney Cunha (Complainant), appeals his termination by Respondent, Department of Transportation (Respondent or CDOT). Complainant seeks reinstatement with back pay, a finding that CDOT violated the Colorado Whistleblower Act and/or the Colorado Anti-discrimination Act, and an award of his reasonable attorney fees.

For the reasons set forth below, Respondent's action is **affirmed**.

#### **ISSUES**

- 1. Whether Complainant committed the acts for which he was disciplined;
- 2. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;
- 3. Whether the discipline imposed was within the reasonable range of alternatives available to the appointing authority;
- 4. Whether attorney fees are warranted.

#### **FINDINGS OF FACT**

#### **General Background**

- 1. Complainant, a native of Brazil, began working for Respondent as a Professional Engineer I in 1991. Complainant became a certified state employee in 1992.
- 2. Complainant was 56 years old at the time of his termination.
- 3. Complainant worked for CDOT's Region II at all times relevant to this appeal.
- 4. At the time of Complainant's termination, Robert Torres was the Regional Transportation Director for Region II and was Complainant's appointing authority.

#### **CDOT'S Workplace Violence Policy**

- 5. In December of 1998, two CDOT employees were shot and one was killed during a disciplinary meeting in Greeley, Colorado.
- 6. After the shootings, CDOT elevated workplace violence to the highest level of concern.
- 7. To address its concerns, CDOT adopted a very stringent policy on workplace violence, which became effective on August 19, 1999.
- 8. CDOT's policy on workplace violence is a "zero tolerance" policy.
- 9. The policy, Policy Directive 10.0 provides, in pertinent part, the following:

#### **PURPOSE**

To formally acknowledge that the Colorado Department of Transportation (CDOT) does not tolerate workplace violence.

## DEFINITIONS

Workplace Violence: Workplace violence is conduct in the workplace against employees, employers, or outsiders committed by persons who either have an employment-related connection with CDOT or are outsiders, involving: (1) physical acts against persons or their property, or against CDOT property; (2) veiled or direct verbal threats, profanity or vicious statements that are meant to harm and/or create a hostile environment; (3) written threats, profanity, vicious cartoons or notes, or other written conduct that is meant to threaten or create a hostile environment; or (4) any other acts that are threatening or intended to injure or convey hostility.

## **POLICY**

Any employee who commits an act of violence at work will be subject to corrective and/or disciplinary action including termination of employment, and where appropriate, shall be referred for prosecution by legal authorities.

. . . .

All employees will receive training concerning their roles and responsibilities in maintaining a nonviolent workplace.

10. On October 19, 2000, CDOT adopted Procedural Directive 10.1, which also addresses workplace violence. That Procedural Directive provides, in pertinent part, the following:

#### **PURPOSE**

To provide a safe and secure work environment for CDOT's staff, visitors and others. Threats, threatening behavior or acts of violence by anyone will not be tolerated. Violations of this directive will lead to personnel action, which may include dismissal, arrest and prosecution.

. . .

#### **DEFINITIONS**

. . . .

Threat: Any communicated message reasonably perceived by others as creating an unsafe work environment.

. . .

#### **PROCEDURES**

. . . .

- II. Threat & Violence Reporting and Investigation
- A. Any event that violates the Workplace Violence Policy Directive or otherwise places persons or property in the workplace at risk must be reported. All forms of threats (verbal or written; direct, conditional or veiled) will be investigated and action deemed appropriate by the appointing authority will be taken. . . . All threats or acts of violence, whether received or observed, are to be reported within 24 hours to:
  - 1. Any supervisor, preferably a supervisor in the line of supervision of the threatening employee, including lead worker (preferred method); or

- 2. Higher level manager, up to the appointing authority; or
  - 3. Civil rights (EEO) representative; or
- 4. Via telephone to the toll free number maintained by the Center for Equal Opportunity (877-757-9928).

. . . .

B. Employees failing to report threats or acts of violence that violate the Workplace Violence Policy Directive or place persons or property in the workplace at risk are subject to performance management review (i.e., considered in the employee's performance rating) and/or corrective/disciplinary action.

. . . .

- E. Personnel receiving reports of threats or acts of violence must complete an incident report within 24 hours. In the event of a threat or action of violence that is judged to be serious, the incident is immediately communicated to the appointing authority prior to completing the incident report. If the appointing authority cannot be reached, the section/branch manager reporting to the appointing authority is notified. A CDOT civil rights (EEO) representative may also be notified.
- 11. Complainant received training on CDOT's workplace violence policy.

#### **Complainant's 1995 Corrective Action**

- 12. In 1995, Complainant met with his then-supervisor, Thomas Wrona, to discuss Complainant's performance over the past year.
- 13. Complainant and Wrona were not in agreement in several areas concerning Complainant's performance; Complainant thought he was entitled to a higher evaluation than Wrona did in some areas.
- 14. During the meeting, Complainant became noticeably upset and angry.
- 15. At one point during the meeting, Complainant tapped his closed briefcase, and said something like, "What if I had a gun in here?" Complainant then pointed his fingers as though he had a gun in his hand and said something like, "Bang! Bang! That's how we take care of problems where I am from."
- 16. Wrona felt shocked, threatened and intimidated by Complainant's behavior.

- 17. Wrona discussed the incident with his supervisor, John Ward, and others at CDOT. Ward was Complainant's appointing authority.
- 18. At the time, CDOT did not have a workplace violence policy as stringent as its current policy, but Wrona thought the incident was very serious.
- 19. Ward held a meeting with Complainant on February 15, 1995, to discuss the incident. During that meeting, Complainant explained that he was only joking and that he had a made a mistake.
- 20. Complainant received a corrective action on February 27, 1995. That corrective action provided, in part, "It was brought to my attention that there was a comment made by you regarding a gun, during the review of your performance appraisal. . . . This type of joking will not be tolerated and will cease immediately. A copy of this letter will be placed in your personnel file for a period of six months, and failure to correct this behavior immediately may result in further corrective and/or disciplinary action. If at the end of six months you have not had any further incidents pertaining to this behavior, this letter will be removed from your file."
- 21. The letter was removed from Complainant's personnel file after six months, but was maintained in a separate file.

#### **Complainant's Interpersonal Skills**

- 22. Complainant was consistently a very good employee as far as his technical skills were concerned. However, Complainant sometimes had problems with his interpersonal skills.
- 23. Complainant often supervised private contractors on CDOT projects. A number of times, contractors complained to CDOT that they were upset about their dealings with Complainant. Specifically, they felt that Complainant was closeminded and inflexible.
- 24. Wrona spent a lot of time coaching Complainant and contractors through situations, and trying to get Complainant to understand and see both sides of a situation.
- 25. At one point, Wrona suggested that Complainant take a training course on tact and diplomacy. Complainant did take that training course and completed it on September 12, 1996.
- 26. Complainant's Performance Planning and Appraisal Form for the time period 12/1/93 to 12/1/94 states that Complainant "needs to improve his interpersonal relations. He needs to treat his employees and contractor representatives with greater respect, tact and diplomacy."

- 27. Complainant's performance evaluation for the period from 4/30/00 to 5/1/01 indicates that he was "Fully Competent," including the area of people skills.
- 28. Minutes (compiled by Complainant) from a meeting concerning Complainant's Interim Evaluation for 2001, dated November 27, 2001, indicate that Complainant's supervisor, David Miller, did not have any problem with Complainant "technically speaking but had room for improvement in the area of people skills. Mr. Miller also mentioned that this fact was reported to him by Messrs. Andy Garton and Doug Lollar, both resident engineers." At the end of those minutes, Complainant wrote the following, "From this meeting, I feel that there are no problems with my people skills, only false information, and misunderstanding related to hydrology."
- 29. Complainant received an overall "Very Good" performance evaluation for the time periods of 5/1/01 to 4/30/02 and 5/1/02 to 4/30/03. Complainant also received a rating of "Good" in the evaluation for 5/1/01 to 4/30/02 in the portion of the evaluation regarding people skills and a rating of "Very Good" 5/1/02 to 4/30/03 evaluation in the portion of the evaluation concerning people skills. There were no comments made that Complainant needed to improve in this area in either of these evaluations.
- 30. Complainant's performance evaluation for the time period from 5/1/03 to 4/30/04 indicated that he was "Good," which meant he "consistently met expectations" overall in the area of people skills. However, his supervisor, David Miller also rated Complainant as "Needs Improvement" in the area of "Demonstrated tact and diplomacy in negotiations or confrontations with others." In an attached sheet to that performance evaluation, Miller wrote under a heading entitled, "People Skills": "Wolney has a tendency to think that his way is the only way that a problem can be solved. He need (sic) to be willing to accepts (sic) other people's comments. He needs to acknowledge work well done by others and demonstrating tact and diplomacy in negotiation or confronting others. The overall feeling is that Wolney does a very good job of responding to requests for information promptly."

#### August 2003 Meeting

- 31. As one of his job duties, Complainant was to review drainage reports and provide comments when CDOT received planning requests. Complainant was given two weeks to provide his comments.
- 32. In July of 2003, Complainant contacted his supervisor, David Miller, by e-mail stating that he wanted control over the distribution of drainage reports that involved him.

- 33. In response to the e-mail, Miller set up a meeting to discuss the timing of the drainage reviews. The meeting was attended by six CDOT employees, including Miller, Wrona and Complainant.
- 34. During the meeting, two CDOT employees explained the process in place for distributing the drainage reports and receiving comments.
- 35. After the process was explained, Complainant was given the opportunity to comment on the process. Complainant responded that that he did not have a problem with the process or the review time. Instead, his concern was that he might be evaluated in his performance evaluation for missing deadlines while on vacation. There was also some discussion about getting the reports to Complainant and other engineers more quickly.
- 36. Miller felt that the meeting had little value as the purpose was to discuss the process for access permits, but Complainant primarily wanted to discuss his evaluation. The more appropriate forum for the meeting would have been a one-on-one meeting between Complainant and Miller.

## Complainant's E-mail to CDOT's Executive Director

- 37. On February 5, 2004, Complainant sent an e-mail to CDOT's Executive Director, Tom Norton. In that e-mail, Complainant wrote, in part, the following, "I am forwarding my resume for your examination with the expectation that maybe the Executive Director might detect some value in it. You mentioned that I should 'work with my supervisor to determine an employee development plan that will help me become fully functional in my current position . . .' and blah, blah, blah. After 11 years working in Region 2, it is hopeless to hope: I'll never be 'fully functional.' If it is true that 'at CDOT, career development begins with the employee,' please find my attached resume. Let's see if you put your money where your mouth is."
- 38. Complainant copied his Appointing Authority, Robert Torres, on February 5, 2004 e-mail.
- 39. Torres was shocked by the tone and the nature of the e-mail. He thought it was an inappropriate e-mail to send to CDOT's Executive Director.
- 40. Norton forwarded the e-mail to a human resources employee, who asked Torres about the situation. Torres explained that Complainant was frustrated about not being promoted.

#### Complainant's E-mail Responses Regarding Trinidad Phase II Meeting

41. On March 31, 2004, one of Complainant's co-workers sent him an e-mail regarding a set of plans and a final hydraulic report for a CDOT project known as

- Trinidad Phase II. The co-worker asked if he was correct in his understanding that Complainant would not have any comments for either the report or the plans because he did not have time to review them.
- 42. In response to that e-mail, Complainant responded, "No, that is not correct. I told you that I am the best looking engineer in Pueblo for sure and probably State wide. Don't mix the facts; I said: Pueblo, for sure and probably State wide. If you mix these things, people will think I'm bragging. And that is not the case, because I know that being good looking, in my case, is not a bragging issue because I was born this way. There is nothing to brag about. I hope you are tranquil now."
- 43. In response to Complainant's e-mail, Doug Lollar, the Project Engineer on the Trinidad Phase project, wrote to Complainant, "Wolney, Am not sure what your response means, perhaps you were simply throwing in some humor. Trinidad Phase II is arguably the most significant upcoming project in the South Program Area and the FOR [Final Office Review] plans require a thorough review by many parties. Are you reviewing the plans/specs/hydraulic report, or will you prior to the FOR, and do you plan to attend the FOR? Thanks, Doug."
- 44. Complainant's response to Lollar's e-mail was, "Dr. Lollar: My response is serious and the subject is serious too. Only a humble person knows what means to look like a bragger! Thanks, wcc."
- 45. Because Lollar was not Complainant's supervisor, he could not order Complainant to attend the meeting. Instead, Lollar contacted Wrona about Complainant's unresponsive e-mails.
- 46.Lollar brought the e-mails to Wrona's attention because Lollar had serious concerns that Complainant wasn't taking his responsibility seriously and wasn't going to attend the meeting and provide the necessary comments on hydraulics.
- 47. Wrona found Complainant's e-mails regarding the Trinidad Phase II meeting to be unprofessional, inappropriate and unresponsive.
- 48. Wrona spoke to Miller, Complainant's supervisor, to see what he knew about the e-mails. Miller then spoke to Complainant and encouraged him to attend the FOR meeting. Complainant did attend.
- 49. Wrona also spoke to Torres and Region II's EEO officer, Mary Dugan, about Complainant's e-mails concerning the Trinidad Phase II FOR meeting.
- 50. Torres and Wrona talked about the e-mails. Torres agreed that Complainant's responses were inappropriate and instructed Wrona to pursue a Corrective Action.

51. Although Wrona drafted a Corrective Action, it was not delivered to Complainant because of an intervening incident Complainant had with his supervisor on May 6, 2004.

## Complainant's April 16, 2004 Memorandum

- 52. Complainant submitted a memorandum entitled "Comments" on April 16, 2004, concerning the Trinidad-Goddard South Phase II project.
- 53. Complainant sent the memorandum to Torres, Wrona, Doug Lollar (the Project Engineer in charge of the project), David Miller, Mary Dugan (Region II's EEO officer), and a co-worker, Joe Garcia.
- 54. The memorandum was submitted when the Trinidad-Goddard South Phase II project was at the point where the final set of plans would be issued to bidders.
- 55. The memorandum was divided into two parts. The first part of the memorandum addressed Complainant's concerns regarding the technical aspects and problems with the project. It summarized the hydraulic issues that arose in the FOR meeting.
- 56. The concerns that Complainant addressed in the first part of the memorandum were appropriate and valid and were typical and ordinary to CDOT's business.
- 57. According to Complainant, some of his concerns included items that would require expensive corrections.
- 58. With respect to Part Two of the memorandum, Complainant wrote the following: "Part 2. is dedicated to identify the problem, analyze it and present solutions and is mostly addressed to Messrs. Tom Wrona, Bob Torres and Mrs. Mary Dugan. This section is here for didactic reasons only. It does not directly relate to the members of the project but they are made aware of it as a matter of courtesy."
- 59. In Part Two, Complainant raised personal issues such as feeling that he faced continuous harassment at CDOT.
- 60. Complainant further wrote that the hydraulic problems on the project existed because he was denied participation in the meetings. He included the following language in Part Two: "It is true that I was present to several meetings related to the project. One thing is to be present at a meeting, the other is to work with the consultant and interact with everybody. This was denied with cold efficiency. So cold and efficient, that after a while, I was feeling like a clown, like a useless piece of thrash (sic) whose feeble attempts to really participate of the project was not only outlandish, was also stupid and holding back the progress of the project. These types of feelings were motivated by the response of the team: my suggestions were ignored and not even answered; my attempts to participate of

the studies with the consultant were consistently ignored. On the other hand, when I was too insistent, the answer to shut me up was that they would look into the issue, only never did. I finally understood that was not even wanted at the meetings when a CDOT employee under the justification that "We don't want this" discarded one of my suggestions on my face. The justification was not a technical explanation. I would understand that because I am not mistake proof. The cold message was: you don't belong here. That was when I stopped going to meetings."

61. Part Two of Complainant's memorandum related to personal issues that were not raised in the proper forum.

#### Incident of May 6, 2004

- 62. On May 6, 2004, Complainant and Miller met to discuss Complainant's annual performance evaluation at approximately 9:00 am. Miller had to attend several meetings after his meeting with Complainant and told Complainant that he could only spend about an hour discussing the performance evaluation.
- 63. Miller had given Complainant a "Needs Improvement" rating in the areas of tact and diplomacy when confronting others. Miller also talked to Complainant about improving his negotiating skills and people skills.
- 64. While Miller was discussing negotiating skills, Complainant pointed his fingers at Miller as though he had a gun in his hands, and said, "What if I pointed a gun at you? How would you negotiate yourself out of this?"
- 65. Again, later in the meeting, as they were discussing Complainant's people skills, Complainant pointed his fingers at Miller as though he had a gun in his hands, and said. "What would you do if I pointed a gun at you?"
- 66. At that point, Miller said something like, "Wolney, we don't talk about those kinds of things."
- 67. Complainant was very upset during the meeting and was speaking very loudly. Miller began to feel that Complainant was verbally attacking him and said, "Wolney, I feel that you are attacking me and I don't appreciate it."
- 68. Several times during the meeting, Complainant told Miller that Miller wanted him fired or dead. Miller told Complainant that he did not want that at all.
- 69. The meeting ended at approximately 10:20 a.m. because Miller had to attend another meeting.
- 70. Miller did not feel scared or intimidated during his meeting with Complainant.

- 71. Miller was busy the rest of the day on May 6, 2004, and did not have time to think about the meeting he had with Complainant.
- 72. When Miller went home that evening, he thought about his meeting with Complainant and became alarmed about Complainant's behavior and felt like he needed to report the incident, pursuant to CDOT's Workplace Violence Policy.
- 73. Miller wrote down his recollection of the meeting at about 9:30 that evening.
- 74. When Miller arrived at work the next morning, he met with Mary Dugan, Region II's EEO representative. Miller gave Dugan the document he had written the previous evening about his meeting with Complainant.
- 75. Dugan instructed Miller to complete CDOT's workplace violence form. She asked Miller to include everything that happened at the meeting.
- 76. Dugan also asked Miller to talk to Wrona about the events because Wrona was Miller's supervisor and because Complainant had mentioned Wrona as a person who Complainant believed was against him during the meeting with Miller.
- 77. When Miller contacted Wrona about the incident, Wrona told Miller about the incident he had with Complainant in 1995. Miller was unaware of the 1995 incident until Wrona told him about it on May 7, 2004.
- 78. When Miller heard that Complainant had exhibited very similar behavior in a meeting with Wrona, he was surprised and scared.
- 79. After Miller completed the workplace violence form, Dugan advised him to stay in his office for safety purposes.
- 80. Dugan called Torres, who was out of the office, and told him about Miller's report.
- 81.Both Dugan and Torres were very sensitive to the issue of workplace violence because they knew the individuals who were shot in Greeley. One of them was a very close friend of Dugan's.
- 82. Complainant's actions of pretending to point a gun at Miller constituted a threat, and were acts that were intended to convey hostility.
- 83. Torres instructed Dugan to put Complainant on administrative leave immediately and to secure the workplace. Torres further told Dugan to get someone to assist her in securing the facility and escorting Complainant off of the CDOT property.
- 84. Dugan asked another employee, Keith Flowerdew, to assist her. She also alerted State Patrol, which has an office on CDOT's premises.

- 85. Dugan and Flowerdew approached Complainant at his workspace and asked him to come outside. Once outside, they informed him of the allegations and placed Complainant on administrative leave with pay pending an investigation and the scheduling of a meeting pursuant to State Personnel Board Rule R-6-10. <sup>1</sup>
- 86. Complainant adamantly denied pointing his fingers at Miller when confronted by Dugan and Flowerdew.

#### Rule R-6-10 Meeting and Disciplinary Action

- 87. Torres held a pre-disciplinary meeting pursuant to State Personnel Board Rule R-6-10 on June 9, 2004. Complainant was present with his attorney.
- 88. During the meeting, Torres read the allegations and excerpts from Miller's report concerning the May 6, 2004 incident. Complainant denied that the incident with Miller ever happened. Torres did not find Complainant's denial to be credible.
- 89. During the meeting, Torres also raised other issues of concern, such as the FOR memorandum, Complainant's performance evaluation for the previous year, the e-mail sent to CDOT Executive Director, Tom Norton, and the e-mails sent regarding the FOR meeting.
- 90. With respect to the e-mails concerning the FOR meeting, Complainant said he was only joking to break the tension. Complainant did not offer any other mitigating information.
- 91. Torres asked Complainant if he would submit to a threat assessment with Dr. Doris Gundersen, a psychiatrist. Complainant agreed to submit to the assessment.
- 92. Complainant did meet with Gundersen on June 14, 2004 for approximately an hour and a half. Gundersen opined that Complainant did not pose an imminent threat to the workplace. She stated that, in her opinion, Complainant "likely suffers from a personality disorder with Narcissistic features." She further opined that if the incident with Miller did occur, Complainant's "prognosis for rehabilitation would be guarded" because Complainant had already received a corrective action for a similar incident.
- 93. Torres was relieved that Gundersen did not believe that Complainant posed an imminent threat to the workplace.

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<sup>&</sup>lt;sup>1</sup> This action was filed prior to July 1, 2005. Effective July 1, 2005 there were substantial revisions to the Board's statutes and its rules. This action is analyzed under the statutes and Board rules in effect prior to July 1, 2005, and all citations are to those statutes and rules.

- 94. Although Gundersen's report gave Torres some new information, it primarily confirmed what Torres already knew about Complainant's demeanor.
- 95. Before deciding on what type of discipline, if any, to impose, Torres gathered more information from Complainant's personnel file and considered Gundersen's report, as well as the information gathered in the R-6-10 meeting.
- 96. Torres did not receive any additional information from Complainant or his attorney after the R-6-10 meeting.
- 97. After Torres had all the relevant information, it took him almost a month to determine what discipline, if any, Complainant should receive.
- 98. Torres considered all forms of discipline for Complainant and also considered the seriousness of termination and what would happen to others if Complainant were not terminated.
- 99. Torres did not provide a copy of Gundersen's report to Complainant until after he made his decision regarding the appropriate discipline for Complainant. While Torres considered the report, he did not rely on it in making his decision. Torres relied on Complainant's actions.
- 100. After the R-6-10 meeting, but prior to Torres' decision, Complainant sent an email to Governor Bill Owens and others regarding the workplace violence allegations against him. That e-mail was sent on June 12, 2004.
- 101. Ultimately, Torres decided to terminate Complainant's employment with CDOT, primarily based on the incident with Miller and the fact that it was so similar to the 1995 incident with Wrona. In the July 9, 2004 termination letter, Torres wrote the following:

I am particularly concerned that when your actions are challenged as they were in a series of April 2004 e-mails, your response was inappropriate and insubordinate. You stated that you were just joking to relieve the tension, but never answered the questions posed to you by your supervisor. This is the same attitude you had when you received a corrective action for workplace violence incident in February 1995. The circumstances in that situation are strikingly similar to the You disagreed with your supervisor, your current allegations. statement was a direct threat to him, and inappropriate in any workplace. The past corrective action should have been ample warning to keep conversations on a professional level rather than implying your response is nothing but a joke. These types of 'jokes' do nothing to help your credibility with your co-workers or supervisors. Further, your actions display a continuous conduct that creates a hostile work environment, as well as a continuous discord and

disregard for authority figures . . . . It my decision that you did violate and willfully disregard CDOT's internal workplace violence policy directive (10.0); that you have been defiant and insubordinate with your supervisors' directions; that you have been directly threatening and have created a hostile work environment with your supervisors when discussing your performance evaluations with you; and you have failed to improve your performance when assisted by various supervisors.

102. Complainant timely appealed his termination.

#### **DISCUSSION**

#### I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. Art. 12, §§ 13-15; §§ 24-50-101, et seq., C.R.S.; Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12B, 4 CCR 801 and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board's rules or of the rules of the agency of employment;
- (3) false statements of fact during the application process for a state position;
- (4) willful failure or inability to perform duties assigned; and
- (5) final conviction of a felony or any other offense involving moral turpitude.

#### A. Burden of Proof

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent's decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

#### II. HEARING ISSUES

## A. Complainant committed the acts for which he was disciplined.

Complainant was disciplined for behaviors that violated CDOT's workplace violence policy. The credible evidence established that Complainant pretended to point a gun at his supervisor, David Miller, during his performance evaluation. Complainant was angry at Miller for giving him a "Needs Improvement" score in the People Skills portion of his evaluation, and he intended to threaten him by pretending to point a gun at Miller, and asking him how he would negotiate himself out of that. This action was a willful violation of CDOT's workplace violence policy. The credible evidence further

established that Complainant sent an e-mail to Tom Norton, CDOT's Executive Director, which was inappropriate and demonstrated a lack of tact and diplomacy. The credible evidence also establishes that Complainant was non-responsive in a series of e-mails concerning a meeting that was very important to a CDOT project. Instead of answering the questions of whether he would be prepared for the meeting, or even attend it, he provided nonsensical answers, which caused his supervisor to have to contact him to ensure that he would indeed attend the meeting. Finally, the credible evidence established that Complainant used a meeting to discuss drainage permit processing and a memorandum discussing flaws with a project to address issues which should have been addressed in a one-on-one meeting with his supervisor.

## B. The Appointing Authority's action was not arbitrary, capricious, or contrary to rule or law.

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; 3) exercised its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Torres did not neglect or refuse to use reasonable diligence and care to procure the evidence he was authorized to consider in exercising his discretion as an appointing authority. Instead, Torres gathered all of the relevant evidence regarding his concerns regarding Complainant. Torres gathered all of the relevant documentation, including Miller's report regarding the May 6, 2004 incident, the FOR memorandum, Complainant's e-mail to Tom Norton, Complainant's evaluations, the e-mails regarding the FOR meeting, and Complainant's 1995 corrective action. Torres also reviewed Gundersen's report and Complainant's personnel file. Additionally, Torres conducted a meeting pursuant to Rule R-6-10 in order to exchange information with Complainant. During that meeting, Complainant was given the opportunity to respond to the allegations against him and to provide any mitigating information. The fact that Torres did not provide a copy of Gundersen's report to Complainant prior to terminating him is harmless error because while Torres considered Gunderson's report, he did not rely on her report in making his final decision because it didn't negate the seriousness of Complainant's actions, especially in light of his history with CDOT.

The credible evidence also established that Torres gave candid and honest consideration to all of the evidence he gathered before him. There was no credible evidence that Torres disregarded any relevant information. Instead, the credible evidence clearly established that Torres carefully and thoroughly considered all of the evidence.

The undisputed evidence also established that Complainant sent an e-mail to CDOT's Executive Director which was unprofessional and inappropriate. Additionally, Complainant was unresponsive and made unprofessional statements in a series of e-mails concerning Complainant's participation at an important meeting regarding Respondent's Trinidad Phase II project. Complainant also used two forums, a meeting called to discuss drainage reports and a memorandum regarding problems with a project, to discuss personal issues that should have been addressed in a private meeting with his supervisor. Complainant's use of those forums to discuss personal issues was inappropriate. Furthermore, Complainant, at times, received low evaluations on his interpersonal skills.

Torres took approximately one month to make his decision regarding Complainant's discipline because he wanted to carefully weigh and consider all of the evidence, including the information that Complainant provided during the R-6-10 meeting, as well as Complainant's past performance evaluations and Complainant's very good technical qualifications before he made his decision to terminate Complainant. Torres' decision was a reasonable one that was reached after he carefully considered all of the evidence before him.

#### **Whistleblower Allegation**

Complainant argues that he was terminated in violation of §25-50.5-101, et seq., C.R.S., also known as the "Whistleblower Act." The Whistleblower Act protects state employees from retaliation by their appointing authorities or their supervisors because of a disclosure of information about state agencies' actions which are not in the public interest, such as waste and mismanagement of public funds, abuses in governmental authority and illegal and unethical practices. Ward v. Industrial Comm'n, 699 P.2d 960, 966 (Colo. 1985).

Complainant asserts that he is being retaliated against for writing and submitting the April 16, 2004 Memorandum, which pointed out several problems with the Trinidad Phase II project, which were potentially expensive to correct. The threshold determination is whether Complainant's disclosures fell within the protection of the Whistleblower Act. *Ward v. Industrial Comm'n*, 699 P.2d 960 (Colo. 1985). The Whistleblower Act defines "disclosure of information" as the "provision of evidence to any person or the testimony before any committee of the general assembly, regarding any action, policy, regulation, practice, or procedure, including but not limited to, the waste of public funds, abuse of authority, or mismanagement of a state agency." §24-50.5-102(2), C.R.S. Complainant's disclosures, if accurate, could possibly be examples of the types of disclosures contemplated by the Whistleblower Act.

According to the Whistleblower statute, it is "the obligation of an employee who wishes to disclose information under the protection of this article to make a good faith effort to provide his supervisor or appointing authority or member of the general assembly the information prior to the time of its disclosure." §24-50.5-103(2). Complainant made the disclosure to several people other than his supervisor and

appointing authority. However, the disclosure to the other individuals was not subsequent to the disclosure to Complainant's appointing authority and supervisor; it was made at the same time. Thus, Complainant's disclosure is not in compliance with the Whistleblower Act, and does not constitute a disclosure under the Act.<sup>2</sup>

Even if Complainant's disclosure did constitute a protected disclosure pursuant to the Whistleblower Act, Complainant must establish that the disclosure was a substantial and motivating factor for his termination. *Ward v. Industrial Comm'n.* Complainant has failed to establish that his disclosure regarding the Trinidad Phase II project was the substantial and motivating factor for his termination. Complainant's April 16, 2004 memorandum concerning his perceived problems with the project was typical and ordinary to CDOT's business. Moreover, the credible evidence established that Complainant was terminated for violating CDOT's workplace violence policy compounded with other incidents of unprofessional behavior. His termination was in no way motivated by the disclosures concerning the Trinidad Phase II project contained in his April 16, 2004 memorandum.

## **Discrimination Based On Age and National Origin**

Complainant alleges that Respondent discriminated against him based on his national origin and his age. In order to prove a prima facie case of intentional discrimination under Colorado law, Complainant must demonstrate by preponderant evidence that: (1) he belongs to a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment decision; and (4) the circumstances give rise to an inference of unlawful discrimination. Colorado Civil Rights Commission v. Big O Tires, 940 P.2d 397, 400 (Colo. 1997), citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). The uncontested information provided establishes that Complainant is a member of a protected class based on both his age and his national origin. Moreover, he apparently was qualified for the position he held as he did so for thirteen years. Additionally, Complainant suffered termination, which is clearly an adverse employment action. The question is, therefore, whether the circumstances give rise to an inference of unlawful discrimination. Complainant failed to establish any circumstances that gave rise to an inference of unlawful discrimination based on either his age or his national origin. Complainant offered no evidence that anyone at CDOT ever made comments about his age or his national origin. Complainant's disciplinary termination was based solely on his behavior.

#### C. The discipline imposed was within the range of reasonable alternatives.

State Personnel Board Rule R-6-6 provides, "The decision to take corrective or disciplinary action shall be based on the nature, extent, seriousness and effect of the act, the error or omission, type and frequency of previous performance evaluations, and mitigating circumstances. Information presented by the employee must also be considered." The credible evidence demonstrates that Torres pursued his decision

<sup>2</sup> Complainant's later communication to Governor Owens and others did not involve the Trinidad Phase II project, and was not the subject of Complainant's whistleblower complaint.

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thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances.

As stated earlier, Torres carefully considered all of the information before making his decision to terminate Complainant, including the information Complainant provided to him during the R-6-10 meeting. Although Torres considered several incidents which caused him concern regarding Complainant's behavior and interpersonal skills at CDOT, by far the most serious was the incident involving Complainant's meeting with Miller on May 6, 2004. CDOT takes instances of workplace violence very seriously. As such, it adopted a zero tolerance policy, Policy 10.0, on workplace violence. All of CDOT's employees, including Complainant, received training on Policy 10.0 and its mandates. CDOT has a duty to protect its employees from violence.

Before the adoption of Policy 10.0, Complainant became upset during a meeting regarding his performance evaluation and told his supervisor, Wrona, that he had a gun in his briefcase and pointed his fingers at Wrona as though he was holding a gun. Although Complainant maintained that he was joking, Wrona did not perceive it as a joke. Complainant received a corrective action for his behavior during that meeting in February of 1995. Yet, nine years later, a strikingly similar incident took place with a new supervisor, Miller, who had no knowledge of the 1995 incident. Again, Complainant became upset during his performance evaluation meeting and pointed his fingers like he was holding a gun, just as he had in 1995, and made threatening comments to Miller. Although the Miller did not feel threatened during the meeting, he did become concerned when he had time to reflect on the incident later that evening. As required by Policy 10.0, Miller reported the incident. Complainant's conduct during the meeting with Miller was serious, flagrant, and in direct violation of CDOT's workplace violence policy. His behavior is even more concerning given that he had been given a corrective action for essentially the same behavior with a different supervisor in 1995. While Complainant's other conduct issues, such as the e-mails and the inappropriate forums for discussing personal problems, were not serious and flagrant, they did compound Torres' concerns regarding Complainant's interpersonal skills. tact and diplomacy. Torres considered other forms of discipline, but elected to terminate Complainant based on the seriousness of Complainant's behavior in the meeting with Miller. Complainant's threatening behavior constituted a willful violation of CDOT's policy on workplace violence. As such, termination was warranted and within the range of reasonable alternatives.

### D. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. § 24-50-125.5, C.R.S. and Board Rule R-8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule R-8-38(B), 4 CCR 801.

Complainant requested an award of attorney fees in this case. Because he did not prevail in this matter, there is no basis for such an award.

#### **CONCLUSIONS OF LAW**

- 1. Complainant committed the acts for which he was disciplined.
- 2. Respondent's action was not arbitrary, capricious, or contrary to rule or law.
- 3. The discipline imposed was within the range of reasonable alternatives.
- 4. Attorney fees are not warranted.

## <u>ORDER</u>

Respondent's action is **affirmed**. Complainant's appeal is dismissed with prejudice. Attorney fees and costs are not awarded.

Dated this day of	, 2005.		
		Hollyce Farrell	
		Administrative Law Judge	
		633 – 17 <sup>th</sup> Street, Suite 1320	
		Denver, CO 80202	
		303-866-3300	

#### **NOTICE OF APPEAL RIGHTS**

#### EACH PARTY HAS THE FOLLOWING RIGHTS

- 1. To abide by the decision of the Administrative Law Judge ("ALJ").
- To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-68B, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

#### **RECORD ON APPEAL**

The cost to prepare the record on appeal in this case is **\$50.00**. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

#### **BRIEFS ON APPEAL**

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An appellant may file a reply brief within five days. An original and 8 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 1/2 inch by 11 inch paper only. Board Rule 8-73B, 4 Code of Colo. Reg. 801.

#### **ORAL ARGUMENT ON APPEAL**

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75B, 4 Code of Colo. Reg. 801. Requests for oral argument are seldom granted.

#### PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ. Board Rule 8-65B

## **CERTIFICATE OF SERVICE**

foregoing INITIAL DECISION OF	day of November, 2005, I placed true copies of the ADMINISTRATIVE LAW JUDGE and NOTICE OF ates mail, postage prepaid, addressed as follows:
David Lichtenstein, Esq. 1556 Williams Street, Suite 100 Denver, Colorado 80218-1635	
and in the interagency mail, to:	
Vincent E. Morscher Assistant Attorney General Employment Law Section 1525 Sherman Street, 5 <sup>th</sup> Floor Denver, Colorado 80203	
	Andrea C. Woods